

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

APPLETON PAPERS INC. AND NCR)
CORPORATION,)
Plaintiffs,)
vs.)
GEORGE A. WHITING PAPER COMPANY,) Case No. 08-CV-00016-WCG
et al.,)
Defendants.)

WISCONSIN PUBLIC SERVICE CORPORATION'S
MOTION TO DISMISS COUNTS I AND III OF
PLAINTIFFS' THIRD AMENDED COMPLAINT

Defendant Wisconsin Public Service Corporation (“WPSC”), by and through its undersigned counsel, hereby moves this Court to dismiss Counts I and III of Plaintiffs’ Third Amended Complaint (the “Complaint”) pursuant to Fed. R. Civ. P. 12(b)(1) and (6).

Count I of the Complaint must be dismissed because the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) does not permit plaintiffs to assert claims under both Section 107 and Section 113 (42 U.S.C. §§ 9607 and 9613, respectively). Plaintiffs have alleged that they incurred costs involuntarily to address contamination of the Lower Fox River, after state and federal officials became involved in connection with that alleged contamination; under these circumstances, plaintiffs’ recovery, if any, would be limited to contribution under Section 113 of CERCLA. Consequently, the Court should dismiss Count I of the Complaint, which purports to assert a claim for recovery under Section 107 of CERCLA. In addition, Count I includes a claim for natural resource damages,

but plaintiffs lack standing to assert a claim for natural resource damages under Section 107(a)(4)(C) of CERCLA because only governmental entities may recover such damages.

Count III of the Complaint seeks a declaration regarding the parties' rights and obligations, including allocable shares of liability, relating to the alleged contamination of the Lower Fox River. However, Section 113 of CERCLA does not permit declaratory relief and, in any event, this Court cannot fully and accurately allocate responsibility for future cleanup costs at this time.

In further support of its motion, WPSC has filed contemporaneously herewith its Memorandum in Support of its Motion to Dismiss Counts I and III of Plaintiffs' Third Amended Complaint.

Dated: June 2, 2008

Respectfully submitted,

WISCONSIN PUBLIC SERVICE
CORPORATION

By: /s/ Sarah A. Slack

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2008, I electronically filed the foregoing
Wisconsin Public Service Corporation's Motion to Dismiss Counts I and III of Plaintiffs' Third Amended Complaint with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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/s/ Sarah A. Slack